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In The

Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

v.

The CITY OF PENSACOLA, and DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 29, 1982

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QUESTIONS PRESENTED

1. Whether an agreement negotiated with the City attorney by one of five bidders (Dollar) for four airport car rental concessions to indemnify potential violations of the federal antitrust laws if the City would reject a competing bid (Greyhound) *cannot,* as a matter of law, constitute an agreement under § 1 of the Sherman Act?

2. Whether an indemnity agreement, embracing prospective violations of the antitrust laws, so fundamentally subverts the national public policy as to be sufficient evidence in quantum and quality of the element of agreement in a § 1 Sherman Act private civil action?

3. Whether the opinion of the Court of Appeals for the Eleventh Circuit should be summarily vacated for failure to follow on rehearing the intervening decision of this Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, _____ U.S. _____, 102 S. Ct. 1935 (1982)?

PARTIES BELOW

All parties in the Court of Appeals are listed in the caption. An additional party in the District Court was granted summary judgment, from which no appeal was taken. The Petitioner, Greyhound Rent-A-Car, Inc., is a subsidiary of Greyhound Corporation. Through the parent corporation, Petitioner is affiliated with forty other subsidiaries of Greyhound: Brewster Transport Company Limited; California Parlor Car Tours Company; Carey Transportation, Inc. (sold June 30, 1982); Gray Line New York Tours Corp. (sold June 30, 1982); Greyhound Lines, Inc., Greyhound Lines of Canada Ltd,; New Mexico Transportation Company, Inc.; Red Top Sedan Service, Inc. (sold June 30, 1982); Texas, New Mexico & Oklahoma Coaches, Inc.; Vermont Transit Co., Inc.; Motor Coach Industries, Inc.; Glacier Park, Inc.; Greyhound Food Management, Inc.; Greyhound Support Services, Inc.; Post Houses, Inc.; Restaura, S.A.; Armour and Company; Armour-Dial, Inc.; Armour Handcrafts, Inc.; Armour International Company; Greyhound Computer Corporation; Greyhound Financial & Leasing Corporation AG; Greyhound Leasing & Financial Corporation; Greyhound Realty Corporation; MCI Acceptance Corp.; Pine Top Insurance Company; Shorrock Security Systems Limited; Travelers Express Company, Inc.; Verex Corporation; Aircraft Service International, Inc., Consultants & Designers Inc.; Dispatch Services, Inc.; Florida Export Tobacco Co. Inc.; Greyhound Exhibitgroup Inc.; Greyhound Exposition Services, Inc.; and Greyhound Temporary Personnel, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 676 F.2d 1380 (1982). The memorandum denial of rehearing by the Court of Appeals is not reported. There is no opinion from the District Court. There is a judgment entered upon jury verdict finding defendants not liable after the initial segment of a bifurcated trial. The opinion, denial of rehearing and judgment are reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1982. A timely petition for rehearing, for which a timely request for enlargement of time had been granted, was denied on August 2, 1982. This petition has been timely filed on or before November 1, 1982. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1337(a). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 15 § 1 provides in pertinent part:[1]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal ....

STATEMENT OF THE CASE

This antitrust litigation, concerning the propriety of an indemnity agreement made in contemplation that future conduct of the Respondents could violate the antitrust laws, arose from the awarding of car rental concessions at the Pensacola, Florida airport. Petitioner-Greyhound's appeal was initially predicated upon the trial court's errors in giving jury

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[1]The remainder of this section, containing criminal penalties, is not relevant here since this was a civil action seeking damages and injunctive relief pursuant to 15 U.S.C. §§ 15 and 26.

instructions and the admission and exclusion of certain evidence. The Court of Appeals, however, found it unnecessary to rule on those matters, because it determined as a matter of law that no agreement existed within the meaning of Section 1 of the Sherman Act. 676 F.2d at 1383.

Regarding the legal issue of a Section 1 agreement and the grounds for seeking Certiorari from this Court, the underlying facts are not complex. Five bids were received by the City of Pensacola for four airport car rental concessions. On the basis of the amount of the bids, Greyhound would have received a concession award and Dollar would not have. Dollar then complained to the City that Greyhound did not meet the so-called national specifications. Greyhound contended it met the national specifications. In addition Greyhound argued (and Dollar disputed) the specifications were illegal restraints of trade under the antitrust laws, noting that the other bidders, Hertz, Avis, and National (but not Dollar), were precluded from urging the use of them under an F.T.C. consent decree. 676 F.2d at 1381-1383.

At this juncture, the City, instead of acting unilaterally to accept or reject the various bids, delayed matters to consider obtaining an indemnity agreement, as was expressly discussed in a formal meeting of the City Commission members:

> "MR. BROWN: You mean you don't think we will get an overnight indemnification for any real—
>
> MR. REEVES: I am telling you I don't think we are going to get an overnight in this public meeting.
>
> MR. KLEIN: Mr. Rose?
>
> MR. ROSE: I was going to say, I think Mr. Reeves is beating around the bush.
>
> Is Dollar and Avis willing to help pay the costs of the suits?

I am just laying it on the table . . . . "

(Exhibit 48, p. 21).

The city attorney proceeded to act accordingly and admitted negotiating with Dollar for an indemnity agreement if Greyhound's bid would be rejected:

> " . . . I was trying to be a little on the safe side. I had been dealing with Henry Barksdale, who's a local attorney, former city attorney, as a matter of fact. Henry was representing Dollar Rent-A-Car and I asked him at some point in time, and as I say, I don't recall exactly when the discussions were, but he had represented to me that if the city rejected Greyhound's bid that there would be no antitrust liability. So I told him to put his money where his mouth was, so to speak, and, "If you're so sure, how about giving us an indemnification agreement?" Mr. Barksdale agreed to do that and did so in his letter of February 22, 1979. In order to be on the safe side, instead of just relying on Henry, I said, "Hey, why don't you get some authorization from," I think Paxton was the fellow that I dealt with before; he was the vice-president, but he was more active than the president. So I believe I asked him to get something in writing from Mr. Paxton authorizing him to do so." (Vol. X, Caton, p. 50).

Thereafter, as a result of these efforts, the attorney for Dollar (Barksdale) sent an indemnity letter to the city attorney (Caton) (Ex 157, set out in Appendix, *infra*), and delivered a copy of an authorization telegram from Paxton, vice-president of Dollar (Ex 158, set out in Appendix, *infra*).

At the Council meeting to award the concessions, the city attorney advised that Greyhound did not operate "nationally"

as set forth in the bid specifications because it did not have rental facilities in more than 25 states. Prior to Dollar's negotiations, the term "national" had not been defined. There was no evidence to support the need for a Pensacola airport car rental concession to operate in 26 or more states. Indeed, the city attorney acknowledged at trial Greyhound met all the other bid criteria.[2]

The Court of Appeals' opinion by Judge Hill reasoned Greyhound "failed to prove the first element of its Section 1 claim" because Dollar and the City in their indemnity negotiations had not agreed on the specific details of effectuating Greyhound's exclusion. 676 F.2d at 1383. The use of the national specifications as defined by the city attorney (i.e., must operate in 26 or more states) as exclusionary criteria, was not considered evidence of "a common course of anticompetitive conduct." 676 F.2d at 1384. The Court further reasoned that the indemnity agreement should be disregarded because it was made and received by the City Attorney without the City Commission having been expressly informed of those

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[2]Mr. Caton asserted that the national requirement was considered a "material" provision in bid specifications by both the former airport managers, Mr. Hubacker and Mr. Hinkle. (Vol. X, Caton, p. 25). Hubacker testified that he did not recall telling anyone it would be essential to operate in twenty-six states. (Vol. XII, p. 282). Mr. Hinkle testified that the surveys the City had conducted about use of the national specifications and which were attached to his report made prior to the indemnity agreement and after Dollar's objection, reflected not a single airport that required a car rental concessionaire to operate nationwide or nationally in scope. Mr. Rose, a City Councilman, testified that he considered rent-it-here, leave-it-there on a local or regional basis to be important, but such a provision was not included in the specifications. (Vol. XIII, p. 414-15). Moreover, Mr. Caton, the City Attorney, admitted that Greyhound met the rent-it-here, leave-it-there provision as it was stated in the concession agreement bid specifications. (Vol. XI, Caton, p. 14-15).

events prior to the City attorney advising the Commission to reject Greyhound, which the Commissioners then voted to do. 676 F.2d at 1384.

Analyzing the indemnity agreement itself, the Court of Appeals determined it to be a gratuitous, aleatory offer which failed to prove a joint anticompetitive purpose because it did not bind the City to any particular course of action. 676 F.2d at 1384. The City, however, in a judicial admission under Rule 36 that was published at trial, conclusively admited:

> "Dollar agreed to indemnify, hold harmless or otherwise protect the City from litigation that Greyhound might file if its bid were rejected." 676 F.2d at 1384, n. 10.

Even though the Court of Appeals held, as a matter of law, there was no agreement for antitrust purposes, it acknowledged that there may be a perfectly valid contract of indemnity:

> "Again we caution that we express no views on the legal enforceability of Dollar's obligation. Our comment is directed solely to the language of Plaintiff's Exhibit 157 insofar as it is pertinent to finding a contract, combination, or conspiracy between the defendants. See note 10 supra." 676 F.2d at 1384, n.11.

The Court of Appeals did not refer to the argument advanced by Greyhound in its briefs and at oral argument that an agreement by one member of a combination to indemnify the other member from the consequences of future violations of the antitrust laws[3] is itself so plainly violative of national public policy as to be an illegal restraint of trade within the meaning of the Sherman Act.

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[3]The indemnity agreement covered any action taken by Greyhound against the City because of Greyhound's exclusion. The agreement

On Petition for Rehearing, the Court of Appeals was not persuaded that its opinion conflicted with the intervening decision of this Court in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, ___ U.S. ___, 102 S. Ct. 1935 (1982), as to the City Attorney's agency relationship with the City Commission and his actual authority. Neither was the Court of Appeals persuaded its opinion conflicted with a long line of this Court's opinions establishing the quantum and quality of proof necessary to show a Sherman Act agreement. The Court of Appeals further declined to rehear its treatment of the judicial and testimonial admissions of the agreement, and would not reconsider whether it had applied criminal law standards of analysis to this civil action.

The Petition for Rehearing was denied without comment. Greyhound now brings this Petition for Certiorari.

Footnote Continued

specifically referred to the antitrust violation alleged, but was not limited to indemnifying only antitrust suits. The agreement stemmed in part from Greyhound's advising the City the material specifications employed to exclude Greyhound from competing were restraints of trade under *Hertz Corp.*, 88 F.T.C. 715 (1976). (676 F.2d at 1382, n.3.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has Decided an Important Question of Federal Law which has not been, but should be, Settled by this Court

Indemnity given before a contemplated anticompetitive act is a major evil, because it induces violations of the antitrust laws. It is therefore the most dangerous kind of agreement in violation of § 1 of the Sherman Act.

Indemnity from the potential of antitrust litigation eliminates the deterrent effect of the antitrust laws, makes more litigation necessary, and amounts to a private repeal of those laws for the indemnified party. Indemnity is therefore license—if not solicitation—to contravene federal law and national policy with impunity.

By deciding the indemnity agreement was not an agreement violative of, within the meaning of, § 1 of the Sherman Act, the Court of Appeals in this case has *pro tanto* eroded the first purpose of this law: its deterrent effect. The Court of Appeals so restrained itself to avoid deciding the question not before it, whether the agreement was enforceable, that it missed the more fundamental threshold national policy issue.

Just as the quite real burdens of antitrust liability prompted the antitrust contribution cases that had to be resolved by this Court in *Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the absence of that device to shift part of the liability after the fact has spawned recourse to the greater evil, shifting total liability before the fact. While it is argued that a rule of antitrust contribution "cuts both ways"[4] regarding deterrent effect, indemnity is a single-edged sword.

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[4] *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

Unlike all prior federal antitrust indemnity cases,[5] this case presents for the first time squarely the issue of whether such an agreement is an illegal one within the meaning of § 1 of the Sherman Act, when the parties entered the indemnity agreement precisely for the purpose of effecting a specifically contemplated anticompetitive act. The Court of Appeals has held that it is not even a contract, combination or conspiracy within the meaning of § 1 of the Sherman Act. Such a decision is irreconcilable with the overarching primary national interest expressed in the federal antitrust laws and is a dangerous precendent that will encourage, rather than inhibit, further litigation through its deleterious impact on the deterrent effect of those laws. It is inconceivable that the agreement could be unenforceable on the one hand because contrary to public policy, but not at the same time be itself violative of national law when entered precisely to privately repeal that national law.

The vindication of federal antitrust policy in its deterrent aspects is a question of bedrock importance which has not been, but should be, decided by this Court.

II. The Court of Appeals has Rendered a Decision Inconsistent with the Controlling Decisions of this Court

The Court of Appeals declined, on rehearing denied, to conform its opinion to the intervening decision of this Court in *American Society of Mechanical Engineers, supra.* While this Court was indeed divided in that case, primarily over the

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[5] *Professional Beauty, supra,* 1186 (request for remand to consider separate indemnity claim denied); *Wilshire Oil Co. v. Riffe,* 409 F.2d 1277 (10th Cir. 1969) (indemnification sought by way of state claim for breach of fiduciary duty); *Bradley Auto Wash Sales, Inc. v. BP Oil, Inc.,* 1982-1 Trade Cases ¶ 64,470 (D. Mass. 1981) (cross-claim for contractual indemnification).

extension of liability to a principal whose agent acted with merely apparent—not actual—authority, the present matter involved an agent with actual authority, the *a fortiori* case upon which this Court appeared to be unanimously agreed.

In *American Society,* the anticompetitive acts were performed without the principal's knowledge at the time, although those acts were later ratified and adopted. There, the agent misused his position and cloaked his private purpose in the mantle of his principal's beneficent public welfare function, misleading others who were unaware of the agent's deviation from fidelity to his principal's competitively neutral interests.

The Court of Appeals acknowledged that one of the principals here, a City Commissioner, first raised the issue of indemnification as a desirable precursor of excluding Greyhound from the market, and that the City Attorney then negotiated for and obtained Dollar's indemnity agreement limited to that purpose before advising his principal to exclude Greyhound. By all accounts at trial, the City Attorney did not explicitly tell the City Commissioners the requisite bargain had been struck. The Court of Appeals did not explain its denial of rehearing on this ground despite the actual authority of the agent, despite the City's judicial admission of the agreement (arguably, at the least, a later ratification and adoption), and despite the business history between the City and Dollar.

Greyhound proved, briefed and argued the earlier indemnity agreement between the respondents, under which the City had breached its contract with three other airport car rental firms, and had been reimbursed by Dollar pursuant to that earlier indemnity agreement. The present indemnity agreement had *not* been created in a vacuum, as one might infer from the opinion of the Court of Appeals; the parties were full well aware of this historical course of dealing among themselves. Moreover, unlike *American Society,* there was no claim in this case that the City Attorney had acted outside, or deceived anyone as to, the scope of his actual authority:

Dollar's representative was present when the Commissioner asked about indemnification.

It is possible that the Court of Appeals misunderstood the concurring opinon of Mr. Chief Justice Burger in *American Society.* Here the agent acted openly with the knowledge, and for the benefit, of the principal, who afterwards also ratified and adopted the conduct of the agent. We recognize that summarily vacating is an infrequent practice, but it is appropriate in cases of clear error like this one. It is particularly appropriate here where the opinion of the Court of Appeals was rendered prior to the controlling decision of this Court, and where the Court of Appeals declined on timely rehearing to conform its opinion to the then controlling decision of this Court. The decision below should be vacated on that ground alone.

Should summary vacating be deemed inappropriate, however, certiorari should be granted and the case set for argument. Not only is the opinion of the Court of Appeals inconsistent with that of this Court in *American Society,* but, as to the more generalized issue of the quantum and quality of proof necessary to establish an agreement within the meaning of § 1 of the Sherman Act, that opinion is inconsistent with a long line of precedent established by this Court.

By isolating the indemnity agreement and examining it without reference to the historical and contemporaneous contexts of which that agreement was but a part, the Court of Appeals ignored the teaching of this Court in its unanimous opinion in *Continental Ore Co. v. Union Carbide and Carbon Corporation,* 370 U.S. 690 (1962). The analogous issue in *Continental Ore* was causation of damages. The Court of Appeals there had separated the woven fabric of proof into single threads, analyzing them one at a time.

The Court characterized this method of analysis *seriatim* of the constituent elements of a Sherman Act claim as

"improper." *Continental Ore, supra,* at 698-99. The Court stated the principle:

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore, supra,* at 699.

Writing for the Court, Mr. Justice White quoted from Judge McAllister's thorough summary of the law then applicable to analyzing the quantum and quality of proof necessary to show an agreement within the meaning of the Sherman Act:

> ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 266 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it. *American Tobacco Co. v. United States,* 147 F.2d 93, 106 (C.A. 6th Cir.);" quoted in *Continental Ore, supra,* at 699.

This Court concluded "the Court of Appeals either overlooked or interpreted into insignificance" the facts which would have given meaning to the isolated items being analyzed. *Continental Ore, supra,* at 700. Twenty years later, the Court of Appeals below has also overlooked or interpreted into insignificance the very facts which would place the indemnity agreement here squarely within the ambit of the Sherman Act.

By narrowing its focus so tightly on the one item actually found in writing evidencing the agreement, the Court of Appeals has also departed from this Court's consistent line of authority that an agreement within the meaning of the Sherman Act may be shown without proof of any express,

written agreement, thus compounding the error of its piecemeal approach to the facts. *See e.g, Eastern States Retail Lumber Dealers' Ass'n. v. United States,* 234 U.S. 600 (1914); *Interstate Circuit , Inc. v. United States,* 306 U.S. 208 (1939); *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948); *United States v. Paramount,* 334 U.S. 131 (1948); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Continental Ore, supra;* and *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969).

By demanding explicit, written evidence that both parties subscribed to a single, identical anticompetitive purpose, the Court of Appeals not only deviated from this Court's reminder that civil antitrust combinations may be proven without having to show common *specific* intent, *United States v. United States Gypsum Co.,* 438 U.S. 422, 436 n. 13 (1978), but also avoided this Court's consistent restriction of the applicability of the *Colgate* doctrine solely to conduct which is clearly unilateral. *United States v. Colgate,* 250 U.S. 300 (1919); *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922).

When a functionally similar situation was presented fourteen years ago, this Court found it sufficient proof of Sherman Act agreement that one party know the anti-competitive desire of the other and knowingly lend its aid.[6] *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968). The Court of

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[6]Petitioner's parent corporation was found liable once under just that principle. The jury was instructed, "A combination results when one or more persons by their acts materially aid in the accomplishment of the plan of another person. It does not require an agreement or contract nor does there have to be a common aim or design. It is enough that one materially aids another in a plan." A.B.A. Antitrust Civil Jury Instructions (1980) at 74, quoting instruction at trial in *Mt. Hood Stages v. Greyhound Corp.,* [appeal reported at 555 F.2d 687 (9th Cir. 1977)].

Appeals erroneously imported the criminal law standard of specific intent and applied it to this civil case. Here the indemnity agreement shows a combination of the monetary power of Dollar with the administrative power of the City to achieve the anticompetitive end that Dollar desired, even more restrictive application of the market entry criteria already found by the Federal Trade Commission to be restraints of trade.[7] The Court of Appeals offers no justification for a change in the civil antitrust standards for proof of agreement from knowing assistance to common specific intent, nor does it explain its inconsistency with the decisions of this Court.

Indeed, the Court of Appeals has created and applied a new civil law standard of proof of Sherman Act agreement that far exceeds in strictness even the highest burden announced by this Court as applicable to criminal antitrust prosecutions. In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court announced the presently applicable standard of proof regarding intent in criminal antitrust cases. Writing for the Court, Mr. Chief Justice Burger stated the rule:

> " . . . [W]e conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Gypsum, supra,* at 444, footnote omitted.

In his concurring and dissenting opinion, Mr. Justice Stevens contrasted that rule with the criminal law standard he would prefer, albeit declaring such rule-making to be the province of Congress:

> "If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate

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[7] *Hertz*, n. 3, *supra*.

> the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market." *Gypsum, supra,* at 474-75, footnote omitted.

Mr. Justice Stevens characterized that rule of knowledge of adverse market effects as "the lesser standard."

The Court of Appeals, however, has held there is no Sherman Act agreement without "an agreement or mutual commitment to engage in a common course of anticompetitive conduct." 676 F.2d at 1383. Focusing on the language of the indemnity agreement, itself an executory contract, the Court of Appeals stated it showed "the City did not commit itself either to reject Greyhound or to any other *particular* course of action." 676 F.2d at 1384, emphasis supplied. The Court of Appeals re-emphasized its conclusion that the agreement must be one evidencing a specific purpose:

> "The indemnity agreement therefore does not reflect a *mutual commitment* by the City and Dollar *to exclude* Greyhound. In short, it does not evidence the defendant's *coming to terms on a common course of action to be concertedly followed.*" 676 F.2d at 1384, emphasis supplied.

The test applied by the Court of Appeals far exceeds that of mere knowledge of adverse effect which this Court fashioned for criminal cases, and approaches, if not equals, the specific purpose test Mr. Justice Stevens would have Congress fashion for criminal prosecutions.

The national interest in enforcement of the antitrust laws requires this Court grant certiorari to correct the liberties the Court of Appeals has taken both with this Court's controlling precendents and with the prerogatives of Congress as the nation's exclusive legislative body.

III. Certiorari Should be Granted to Decide an Important Issue on Which There is a Conflict in the Circuits

Since construing the Sherman Act is similar to construing equally general constitutional provisions, *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-60 (1933), resolution of conflicts in the circuits regarding the proper interpretation of that law is an important function of this Court. The application of the antitrust laws is a fact-specific enterprise. *United States v. United States Gypsum Co.,* 438 U.S. 422, 438 (1978). Given the variety of means creative enterprises invent to achieve their ends, and the generality of the statute, there easily arise from time to time conflicts among the circuits such as is present here.

The notion of combination, whether by contract, conspiracy, or some other joinder of separate entities, is the heart of an offense against § 1 of the Sherman Act. *See, generally,* Kintner, Federal Antitrust Law, §§ 3.2 and 9.3 (1980). The proper construction of the central feature of this law is an important issue, not only for its effect on the conduct of commerce in this nation, but also for its effect on the administration of justice in the federal courts.[8]

The uncertain state of the law in this area is illustrated by the fact that the Court of Appeals did not support with even one citation to authority its holding that the indemnity agreement did not meet Sherman Act agreement standards; in that respect, it is unprecedented.

Conflict in the circuits is illustrated by the decisions of the Ninth Circuit in *Esco Corporation v. United States,* 340 F.2d

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[8]It is also important to the administration of justice in state courts depending on this Court to guide the interpretation of state antitrust laws. *See, e.g.,* §§ 542.18 and 542.32, Fla. Stat. 1981.

1000 (1965), and *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (1975), *cert. den.* 96 S. Ct. 782.[9]

In *Esco*, the Court of Appeals agreed that the existence of a contract, combination or conspiracy was the crucial evidentiary question on appeal. The Court rejected the contention that the mutual assent a Sherman Act agreement requires must be an exchange of assurances to take or refrain from a given course of conduct. The Court summarized the applicable rules:

> "It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. [Citations omitted.] Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. [Citation omitted.] Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy." *Esco, supra*, at 1008.

In *Helix Milling*, the Court of Appeals reversed the district court's grant of summary judgment to defendants on the § 1 Sherman Act claim. Helix's mill had been destroyed and, it was alleged, defendants agreed to prevent Helix from acquiring a ready replacement. The Court dealt specifically with the requisite quality of proof for there to be found a Sherman Act agreement, disagreeing with the district court's formulation of the rule, not unlike the formulation at issue here in the Eleventh Circuit:

> "The district court also noted that, in order to find a combination in this case, it would have been necessary to prove an agreement between defendants that

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[9]Indeed, the Ninth Circuit withdrew its earlier opinion in *Helix Milling* to treat more thoroughly the issue of common specific intent. That earlier decision is reported in 1975-1 Trade Cases ¶ 60, 372.

> neither of their mills would be sold to Helix. This misstates the rule. Proof of participation in a course of conduct that has the necessary consequence of barring entry of competition into the market would provide the basis for a finding of a combination. *Albrecht v. Herald Co.*, 390 U.S. 145, 149-150 (1968); *Pearl Brewing Co. v. Anheuser-Busch Co.*, 339 F.Supp. 945, 950 (S.D. Texas 1972). The collaboration of the person necessary to establish a combination need not even be willing, *Albrecht* at 150 n. 6." *Helix Milling, supra,* at 1321-22.

The Court of Appeals held that proof of the specific anticompetitive purpose was not required since proof of specific intent was not required.

Because the Ninth and Eleventh Circuits directly conflict on whether proof of a Sherman Act agreement must contain proof of the common specifically intended anticompetitive purpose, the state of the law is uncertain. The lower courts, litigants and the national interest alike require this Court resolve the conflict over this important question. Certiorari should be granted and the case set for argument.

CONCLUSION

For the reasons set forth, this Court should grant the petition for a writ of certiorari and summarily vacate the decision of the Court of Appeals on the authority of the *American Society of Mechanical Engineers* decision. Alternatively the case should be set for argument to decide the important Federal question presented and resolve the conflict in the law on Sherman Act agreement evidenced by this decision and the decisions of the Ninth Circuit in *Esco* and *Helix Milling*.

Respectfully submitted,

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GREYHOUND RENT-A-CAR, INC.,
a Florida Corporation,
Plaintiff-Appellant,

v.

The CITY OF PENSACOLA,
a Florida Municipality; Dollar Rent-A-Car System, Inc., et al., Defendants-Appellees.

No. 81-5243.

United States Court of Appeals,
Eleventh Circuit.

May 28, 1982.

Appeal from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges:

JAMES C. HILL, Circuit Judge:

Greyhound Rent-a-Car, Inc. (Greyhound) appeals from an adverse jury verdict rendered in its antitrust suit against the City of Pensacola, Florida (City) and Dollar Rent-a-Car Systems, Inc. (Dollar). For the reasons developed below, we affirm.

I

Greyhound and Dollar are two of five car rental companies who submitted bids for on-airport car rental concessions at the

Pensacola Regional Airport.[1] The City planned to award no more than four concessions to the highest bidders. When the opening of the sealed bids on January 15, 1979 revealed Dollar to be the lowest bidder,[2] Dollar objected that Greyhound was disqualified from bidding because of its failure to meet the performance ability specifications in the bid package. These specifications, carried over from the City's 1968 and 1973 bid packages into the 1978 package, provided in part:

> [I]n order to be qualified to submit a bid, bidder must be capable of providing the following services for its customers at the Pensacola Regional Airport:
>
> (a) National credit card system
> (b) National reservation system
> (c) "Rent-it here, Leave-it there" service.
> (d) Must provide bodily injury and property damage liability insurance as primary coverage and not as excess of customer's liability insurance coverage.
>
> Also, each bidder must have been engaged in the automobile rental business on a national scale for at least five years immediately prior to the date its bid is submitted . . . .

Plaintiff's Exhibit 47 at 4. In particular Dollar asserted that Greyhound had not operated its car rental business "on a national scale" for the immediately preceding five years because

---

[1]The three remaining bidders were Hertz Corp., National Car Rental System, Inc., and Avis Rent-a-Car System, Inc.

[2]The Minimum revenue guaranteed to the City by each of the bidders for the five-year period of the concession contracts was: Hertz—$410,000; National—$365,484; Greyhound—$361,081; Avis—$343,716; Dollar—$277,600. Plaintiff's Exhibit 62.

it had rental locations in only five states. Dollar also questioned Greyhound's compliance with the requirements of a national credit card system, a national reservation system, and primary liability insurance coverage. Plaintiff's Exhibit 87. Greyhound responded that it did qualify, contending that its maintenance of offices in Florida, Georgia, Louisiana, and Arizona and its recent expansion into Nevada, California, and Colorado constituted a national scale operation. Plaintiff's Exhibit 89.

After reviewing this dispute and discussing it with the city attorney and the airport manager, the city manager advised a committee of the city council that the specifications in question served the material purpose of insuring "a consistently high level of service to the travelling public ... which combines maximum convenience to the public, uniform ability to provide service throughout the United States, and a common basis for competition among all concessionnaires." Plaintiff's Exhibit 62. On this basis the city manager recommended that Greyhound be disqualified for failure to operate on a national scale and that contracts be awarded to Hertz, National, Avis, and Dollar.

At the city council meeting which followed on February 5, 1979, Greyhound protested that the City's national scale requirement constituted an unlawful restraint on competition. Plaintiff's Exhibit 48 at 9-11.[3] Dollar's counsel advised the City

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[3] Greyhound's counsel referred specifically to a consent decree entered by the Federal Trade Commission against Hertz, National, and Avis prohibiting each of these companies from, *inter alia*, conspiring with competitors to obtain airport car rental bid specifications or concessions contracts containing such requirements as a national credit card system, national reservation system, one-way rental service, operation at a minimum number of airports or for a minimum number of years, and operation on a national scale. The decree further prohibited the companies from recommending the inclusion of these provisions in bid packages and concession agreements. *Hertz Corp.*, 88 F.T.C. 715 (1976).

that it saw no antitrust liability on the part of either Dollar or the City if the City chose to enforce its specifications and reject Greyhound's bid. *Id.* at 5. The city attorney also informed the council that his research had revealed one court decision defining a national operation as one carried on in over half the states.[4]

Concerned about the City's exposure to liability, the council deferred action on the award of bids for two weeks pending further investigation.[5] During this time the city attorney approached Dollar's local counsel about Dollar's indemnifying the City from any lawsuit resulting from invalidation of Greyhound's bid. Transcript, vol. X, Testimony of Don Caton at 50. In response Dollar's vice-president sent a telegram to Dollar's local counsel authorizing him "acting on behalf of Dollar Rent-a-Car Systems, Inc. to enter an indemnification agreement with the City of Pensacola ... [to] indemnify the City from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent-A-Car by the City of Pensacola." Plaintiff's Exhibit 158. In turn Dollar's local counsel provided the city attorney with a letter reciting his authority to indemnify the City for "all costs and damages which may be assessed against the city in the event the contract ... is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof." Plaintiff's Exhibit 157. Finally on February 22, 1979, the council voted, without any

---

[4] Theretofore the meaning of the specification requiring operation "on a national scale" had not been defined.

[5] The councilman who moved to postpone action on the matter expressed his concern this way: "[B]asically we look like we are looking at a law suit either way we want to go, ... and I just think we ought to take a look at it..." Plaintiff's Exhibit 48 at 21.

discussion of indemnification,[6] to award the concession contracts to Hertz, National, Avis, and Dollar. Plaintiff's Exhibit 50 at 27.

Greyhound subsequently commenced this suit under § 1 of the Sherman Act, 15 U.S.C. § 1, on the theory that Dollar and the City had contracted, combined, or conspired to exclude it from being awarded a car rental concession at the airport. According to Greyhound, the evidence it adduced at trial established a boycott within the pattern of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), a restraint which the Supreme Court has condemned as a per se violation of the Sherman Act.[7] On appeal Greyhound complains of the district court's submission of the case to the jury under a rule of reason rather than a per se instruction and, even if a rule of reason instruction was warranted, of error within the charge given. Greyhound further attacks two evidentiary rulings made by the trial judge: (1) the admission of the city attorney's testimony that he found no evidence of an antitrust violation by the City, and (2) the exclusion of an exhibit indicating Dollar's increase of its bid after learning there were five, rather than four, bidders.

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[6] The city attorney testified that he did not bring the existence of any indemnity agreement to the councilmen's attention before they voted. Transcript, vol. X, Testimony of Don Caton at 83-84. The minutes of the council meeting also reveal no discussion of indemnification. Plaintiff's Exhibit 50.

[7] In *Klor's* the Supreme Court held that a group boycott forbidden by the Sherman Act was stated by the allegations of the plaintiff retail store that national appliance manufacturers had conspired among themselves and with the plaintiff's retail competitor not to sell to plaintiff or to sell only on unfavorable terms.

We affirm the entry of judgment against Greyhound because we conclude there was insufficient evidence to establish any contract, combination, or conspiracy between Dollar and the City within the meaning of § 1 of the Sherman Act. Greyhound having failed to prove the first element of its § 1 claim, we need not therefore address the challenges it presents to the jury instructions and to the admission and exclusion of evidence unrelated to the issue of agreement.

II

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919), established that the Sherman Act does not restrict the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal" and to announce in advance the terms on which he will deal. Hence the right of the City in this case to deal only with parties who meet certain specifications that the city deems material and to refuse unilaterally to deal with Greyhound if it fails to comply with these specifications cannot be questioned.[8] Greyhound contends, however, that this case presents something more than the City's individual refusal to deal with it. Although *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), indicates that an individual refusal to deal may violate the Sherman Act when it is supported by an agreement with the victim's competitor, we cannot find in the record evidence of an agreement between the City and Dollar within the meaning of the "contract, combination . . . or conspiracy" language of § 1 of the Sherman Act.

---

[8] On appeal Greyhound has not pursued the argument that the "national scale" requirement, standing alone and apart from its use as a result as a conspiracy, offends antitrust laws. We do not address that question.

The essence of a contract, combination or conspiracy which is condemned by § 1 is an agreement or mutual commitment to engage in a common course of anticompetitive conduct. As Professor Sullivan states: "The bottom layer of the analysis is always the finding that concerted action did occur, that conspirators ... came to terms on a common course to be concertedly followed." L. Sullivan, *Handbook of the Law of Antitrust* § 109 at 313 (1977). The facts of this case raise three possible theories for alleging a concert of action or conspiracy between the City and Dollar. Each is unavailing for Greyhound.

First, had Dollar induced the City to insert the national specifications in the bid packages, Greyhound could have cleared at the least the first hurdle of its § 1 claim.[9] Similarly if Dollar had induced the City to adopt a definition of "national scale" that would automatically disqualify Greyhound as a bidder, the element of combination would be satisfied. But evidentiary support for either of these theories is lacking. There is clear, uncontradicted testimony that the City had no discussion or contact with any of the bidders regarding use of the national specifications. Transcript, vol. XII, Testimony of Edmond R. Hinkle at 168-69; Depositions, vol. IX, Deposition of Gary Paxton at 83, 94-95; Transcript, vol. XIII, Testimony of James Reeves at 352. Furthermore, the definition of operating on a "national scale" as requiring business in more

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[9] We do not comment on whether such a conspiracy would constitute an unlawful restraint of trade. *Cf. In Re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D.Cal. 1981), *appeal docketed*, No. 81-4399 (9th Cir. Aug. 5, 1981) (*Noerr-Pennington* doctrine precludes liability for agreement between airport officials and rental car companies regarding eligibility requirements and terms of concession contracts).

than half the states was solely the product of the city attorney's independent research. Transcript, vol. X, Testimony of Don Caton at 36, 77.

The most promising theory, and the one on which Greyhound relies, is that the indemnity agreement between Dollar and the city reflects the defendants' commitment to a common course of action, namely the City's exclusion of Greyhound and award of a contract to Dollar in exchange for Dollar's payment of any damages and costs incurred in legal proceedings arising from the City's actions.[10] Greyhound

---

[10] Apparently there is some dispute between the defendants regarding Dollar's agreement to indemnify the City. According to the city attorney's testimony, the City regarded the letter of Dollar's local counsel reciting his authority to indemnify the City (Plaintiff's Exhibit 157) as sufficient evidence of Dollar's obligation at the time of the letters received. After this litigation commenced, however, the city sought to formalize the indemnity agreement. The city attorney prepared a rought draft of a proposed agreement and sent it to Dollar. Transcript, vol. X, Testimony of Don Caton at 56. Dollar's vice-president, who testified to receiving this document, refused to sign it. *Id.*, Testimony of Gary Paxton at 63. This document was the subject of a request for production and subsequently of Greyhound's motion to compel production and for sanctions. Both the city attorney and Dollar's vice-president testified that they had not retained, and could not locate, a copy of that document. *Id.*, Testimony of Don Caton at 57-58; Testimony of Gary Paxton at 65.

We do not purport to resolve any questions regarding the enforceability of Dollar's agreement to indemnify or the extent of Dollar's obligation. For purposes of our inquiry into the existence of a contract, combination, or conspiracy, we note only that it is undisputed that *some* kind of agreement exists. Dollar's vice-president ackowledged the existence of some "understanding" with the City regarding indemnification, although he disputed the existence of an "agreement" regarding the details. *Id.*, Testimony of Gary Paxton at 61. Moreover, the City judicially admitted under Rule 36 that "Dollar agreed to indemnify, hold harmless or otherwise protect the city from litigation that Greyhound might file if its bid were rejected." *Id.*, vol XI, at 76.

would have us view the indemnity agreement as reading in effect: "For and in consideration of Dollar's promise to indemnify, the City hereby promises to reject the bid of Greyhound Rent-a-Car." This interpretation of the agreement cannot be supported by either the language of the agreement or by any inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound or to any other particular course of action. It was Dollar which committed itself to certain conduct—namely indemnification of the City *in the event that* the City chose, for whatever reason, to reject Greyhound and litigation ensued.[11] Furthermore, there is nothing in the record to suggest that the City Council's ultimate decision to reject Greyhound was induced or supported by the indemnity agreement with Dollar. It is true that a city councilman initially voiced concern about the City's potential liability and the desirability of indemnification at the February 5 council meeting. Plaintiff's Exhibit 48 at 21. There is no indication, however, that the council charged the city attorney with the task of entering into a bargain with Dollar for indemnification. Moreover, there is uncontradicted testimony that the councilmen were not informed of an indemnity agreement prior to their vote on February 22, Transcript, vol. X, Testimony of Don Caton at 83-84, and that the councilmen were swayed by their view that the national scale specification was a material requirement necessary to ensure convenient and reliable service to the travelling public. Transcript, vol. XIII, Testimony of James Reeves at 352-54; *id.*, testimony of Albert

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[11] Again we caution that we express no views on the legal enforceability of Dollar's obligation. Our coment is directed solely to the language of Plaintiff's Exhibit 157 insofar as it is pertinent to finding a contract, combination, or conspiracy between the defendants. *See* note 10 *supra*.

Klein, Jr. at 387-88; *id.*, Testimony of Franklin Pryor at 396-97; *id.*, Testimony of Harold Rose at 401-02, 404-05. The indemnity agreement therefore does not reflect a mutual commitment by the City and Dollar to exclude Greyhound. In short, it does not evidence the defendant's coming to terms on a common course of action to be concertedly followed.

In light of the lack of evidence to establish a contract, combination, or conspiracy within § 1 of the Sherman Act, the judgment of the district court in favor of Dollar and the City is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5243

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED AUGUST 2, 1982

Norman E. Zoller
Clerk

GREYHOUND RENT-A-CAR, INC.,
a Florida Corporation

Plaintiff-Appellant,

versus

THE CITY OF PENSACOLA,
a Florida municipality;
DOLLAR RENT-A-CAR SYSTEMS, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Florida

ON PETITION FOR REHEARING

( )

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

UNITED STATES DISTRICT COURT

for the
Northern District of Florida

Pensacola Division

CIVIL ACTION FILE NO. PCA 79-0489

GREYHOUND RENT-A-CAR, INC.,

vs.

THE CITY OF PENSACOLA, a Florida municipality; et al.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Winston E. Arnow, Chief, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants The City of Pensacola and Dollar Rent-A-Car recover of the plaintiff Greyhound Rent-A-Car, Inc. their costs of action.

Dated at Pensacola, Florida, this 30th day of October, 1980.

OFFICE OF THE CLERK
U.S. DISTRICT COURT
NORTH DISTRICT, FLORIDA
PENSACOLA, FLORIDA

FILED OCTOBER 30, 1980, 11:30 AM

MARVIN S. WAITS
Clerk of Court

By: Bruce McMirideni
Deputy Clerk

TELEGRAM

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4-038731 EO52 02/21/79
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PMS HENRY BARKSDALE, ATTY AT LAW, DLR
1014 EAST MALLORY ST
PENSACOLA FL 32503

Confirming our conversation of today I hereby authorize you acting on behalf of Dollar Rent A Car Systems Inc to enter an indemnification agreement with the City of Pensacola. Such agreement will indemnify the city from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent A Car by the City of Pensacola.

Gary Paxton, Vice President, Dollar Rent A Car Systems Inc

1408 EST

HENRY R. BARKSDALE, P.A.
ATTORNEY & COUNSELLOR AT LAW
1014 East Mallory St.
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(904) 432-0948

February 22, 1979

Honorable Don J. Caton, City Attorney
City of Pensacola
City Hall
Pensacola, Florida 32501

Re: Bid of Dollar Rent A Car Systems, Inc.

Dear Don:

In accordance with our recent conversation enclosed is a copy of the July 13, 1976 Consent Order by the Federal Trade Commission against Hertz Corporation, et al, which we discussed recently.

As you can tell by reading this Consent Order Mr. Don Tucker representing Greyhound Rent A Car has mislead the City Council as to the contents thereof. This order was entered in the matter of Hertz Corporation, Avis Rent A Car, and National Car Rental System ordering them not to conspire with each other to dictate to municipalities or authorities the terms of the bid specifications or other matters contained in said order. It does not condemn the requirement by a municipality or authority as to the terms of the bid specifications, as long as these three, known as the "Big Three" in the car rental chain, do not conspire with each other or a competitor to require the terms set forth in the order. I am certain that this has not been done with the City of Pensacola.

I have been authorized by Mr. Gary Paxton, Vice-President of Dollar Rent A Car Systems, Inc. to enter an Indemnification Agreement on behalf of Dollar Rent A Car Systems, Inc. to pay all costs and damages which may be assessed against the city in the event the contract for automobile concession at the Pensacola Municipal Airport is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof.

It is my understanding that some question has been raised by Greyhound that in view of the fact that Dollar Rent A Car System, Inc. does not have automobiles listed in their name but only in the franchisees name that they are not, therefore, a national organization and not operating on a national scale. If we adopt this conclusion then it could be said that not even McDonald's Hamburgers are a national organization, and I do not believe anyone would make a serious contention of this fact.

Dollar operates in approximately 45 states thru franchise holders who perform under the auspices of the national organization and subject to the terms of the Franchise Agreement. Dollar Rent A Car Systems, Inc. signed the bid and is responsible for the performance of the contract. Merely not having the automobile titled in the name of the parent corporation does not in any way mean they are not operating on a national scale.

I trust this is the information you desire.

Yours very truly,

Henry R. Barksdale

HRB/sm
Enclosure

EXTRACT FROM PAXTON TRIAL TESTIMONY

* * *

Q. [By Mr. VanDercreek] Do you have a written indemnity, hold-harmless or similar agreement with the City of Pensacola pertaining to this present antitrust action which has been instituted by Greyhound against Dollar, Sea Bear and the City of Pensacola?

A. [By Mr. Paxton] We have an understanding with the city that's been put into evidence already. I don't consider that an agreement.

Q. On - when your deposition was taken in this case, you were asked that question and you said no, is that correct?

A. That's correct. I just gave you the same answer.

Q. Well, at this time you said you had an understanding and there you said no.

A. No, we don't have an agreement.

THE COURT: What's the difference between an understanding and an agreement?

A. Well, I've had an understanding with my wife I was going to buy her a new car but we haven't agreed it's to be a Cadillac or Datsun, Your Honor. We've got an understanding but haven't agreed to the details.

THE COURT: What you're saying is that you have an understanding with the city that you will indemnify them on this litigation but haven't agreed to the details? Is that what you're saying?

A. That's correct.

* * *

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

CASE NO. 82-745

in the Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

vs.

CITY OF PENSACOLA, and
DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT CITY OF PENSACOLA IN OPPOSITION

JOE J. HARRELL
201 East Government Street
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and
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Attorneys for City of Pensacola

QUESTIONS PRESENTED

Petitioner claims the record presents the following questions:

1. Whether an agreement negotiated with the City attorney by one of five bidders (Dollar) for four airport car rental concessions to indemnify potential violations of the federal antitrust laws if the City would reject a competing bid (Greyhound) *cannot*, as a matter of law, constitute an agreement under §1 of the Sherman Act?

2. Whether an indemnity agreement, embracing prospective violations of the antitrust laws, so fundamentally subverts the national public policy as to be sufficient evidence in quantum and quality of the element of agreement in a §1 Sherman Act private civil action?

3. Whether the opinion of the Court of Appeals for the Eleventh Circuit should be summarily vacated for failure to follow on rehearing the intervening decision of this Court in *American Society of Mechanical Engineers Inc. v. Hydrolevel Corp.*, ___ U.S. ___, 102 S.Ct. 1935 (1982)?

The Respondent, City of Pensacola, contends that none of the above three questions is actually presented by the record.

LISTING PURSUANT TO SUPREME COURT RULE 28.1

The Respondent City has nothing to add to the listing of the parties provided by Petitioner.

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CASE NO. 82-745

in the Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

vs.

CITY OF PENSACOLA, and
DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT CITY OF PENSACOLA IN OPPOSITION

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 676 F.2d 1380. The Eleventh Circuit's memorandum order denying rehearing is not reported. Both the opinion and the order denying rehearing are reproduced in the Appendix to the Petition. The Appendix also contains a copy of the final judgment entered upon the jury's verdict for Respondents in the trial court.

GROUNDS FOR INVOKING JURISDICTION OF COURT

The judgment of the Court of Appeals was entered on May 28, 1982. A timely petition for rehearing, for which a timely request for enlargement of time had been granted, was denied on August 2, 1982. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1337(a). Jurisdiction in this Court exists under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Respondent City operates the Pensacola Regional Airport. On January 15, 1979, it opened sealed bids for on-airport car rental concessions. There were five bidders,[1] and the Respondent City planned to award no more than four concessions at the airport to the highest bidders. The Respondent Dollar was the low bidder. When bids were opened and it was learned that Greyhound had submitted a bid, Dollar protested Petitioner's bid on the ground that Petitioner failed to

[1]Bids were submitted by Hertz, Avis, National Car Rental, Petitioner, and the Respondent Dollar.

meet the performance ability specifications in the bid package. One of these specifications was that the bidder "must have been engaged in the auto rental business on a national scale for at least five years immediately prior to the date its bid is submitted." Petitioner had only done business in Florida, Georgia, Louisiana, and Arizona during the five year period in question.

When the dispute arose, the City Manager of the Respondent City conferred with the airport manager and the city attorney. Thereafter, the city manager advised a committee of the city council that petitioner should be disqualified because it had not satisfied the "doing business on a national scale" requirement, which was determined to be a material part of the specifications.

On February 5, 1979, there was a meeting of the Pensacola City Council. At this meeting, Petitioner contested its disqualification as a bidder; the City Attorney advised the city council that, based upon his independent legal research, the most appropriate definition of operating on a "national scale" meant doing business in more than one-third of the states; and a lawyer for Respondent Dollar advised the council that he saw no antitrust liability on Respondent's part if Petitioner's bid were rejected.

The Council deferred action for two weeks pending further investigation. During this interval:

> . . . the city attorney approached Dollar's local counsel about Dollar's indemnifying the City from any lawsuit resulting from invalidation of Greyhound's bid. Transcript, vol. X, Testimony of Don Caton at 50. In response Dollar's vice-

president sent a telegram to Dollar's local counsel authorizing him 'acting on behalf of Dollar Rent-a-Car Systems, Inc. to enter an indemnification agreement with the City of Pensacola . . . [to] indemnify the City from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent-a-Car by the City of Pensacola.' Plaintiff's Exhibit 158. In turn Dollar's local counsel provided the city attorney with a letter reciting his authority to indemnify the City for 'all costs and damages which may be assessed against the city in the event the contract . . . is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof.' Plaintiff's Exhibit 157. Finally on February 22, 1979, the council voted, without any discussion of indemnification, to award the concession contracts to Hertz, National, Avis, and Dollar. Plaintiff's Exhibit 50 at 27.

Thereafter, Petitioner sued Respondents in the United States District Court for the Northern District of Florida claiming the Respondents had violated §1 of the Sherman Act, 15 U.S.C. §1. According to Petitioner, the Respondents contracted, combined or conspired to exclude Petitioner from obtaining a car rental concession at the airport. The case was tried before a jury which found for the Respondents. Final judgments were entered for Respondents. Petitioner then appealed to the United States Court of Appeals for the Eleventh Circuit.

On appeal, Petitioner attempted to raise questions concerning evidentiary rulings and jury instructions.

The Eleventh Circuit declined to rule on any of these questions, stating:

> We affirm the entry of judgment against Greyhound because we conclude there was insufficient evidence to establish any contract, combination, or conspiracy between Dollar and the City within the meaning of §1 of the Sherman Act. Greyhound having failed to prove the first element of its §1 claim, we need not therefore address the challenges it presents to the jury instructions and to the admission and exclusion of evidence unrelated to the issue of agreement. (676 F.2d at 1383).

In reaching the above conclusion, the Eleventh Circuit reasoned as follows:

> . . . The facts of this case raise three possible theories for alleging a concert of action or conspiracy between the City and Dollar. Each is unavailing for Greyhound.
>
> First, had Dollar induced the City to insert the national specifications in the bid packages, Greyhound could have cleared at the least the first hurdle of its §1 claim. Similarly if Dollar had induced the City to adopt a definition of 'nationa' scale' that would automatically disqualify Greyhound as a bidder, the element of combination would be satisfied. But evidentiary support for either of these theories is lacking. There is clear, uncontradicted testimony that the City had no discussion or

contact with any of the bidders regarding use of the national specifications. Transcript, vol. XII, Testimony of Edmond R. Hinkle at 168-69; Depositions, vol. IX, Deposition of Gary Paxton at 83, 94-95; Transcript, vol. XIII, Testimony of James Reeves at 352. Furthermore, the definition of operating on a 'national scale' as requiring business in more than half the states was solely the product of the city attorney's independent research. Transcript, vol. X, Testimony of Don Caton, at 36, 77.

The most promising theory, and the one on which Greyhound relies, is that the indemnity agreement between Dollar and the City reflects the defendants' commitment to a common course of action, namely the City's exclusion of Greyhound and award of a contract to Dollar in exchange for Dollar's payment of any damages and costs incurred in legal proceedings arising from the City's actions. Greyhound would have us view the indemnity agreement as reading in effect: 'For and in consideration of Dollar's promise to indemnify, the City hereby promises to reject the bid of Greyhound Rent-a-Car.' This interpretation of the agreement cannot be supported by either the language of the agreement or by an inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound or to any other particular course of action. It was Dollar which committed itself

to certain conduct—namely, indemnification of the City *in the event that* the City chose, for whatever reason, to reject Greyhound and litigation ensued. Furthermore, there is nothing in the record to suggest that the city council's ultimate decision to reject Greyhound was induced or supported by the indemnity agreement with Dollar. . . . (676 F.2d at 1383-1384).

After denial of its motion for rehearing, Petitioner now seeks review by certiorari in this Court.

REASONS FOR DENYING THE WRIT

The Respondent City urges the Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit for the following reasons:

1. None of the questions Petitioner seeks to raise is actually presented by the Record. In seeking to raise these questions, Petitioner merely assumes as true matters which a jury and the Eleventh Circuit could find no support in the Record.

2. In Questions 1 and 2, Petitioner incorrectly assumes that the Respondent City agreed to reject Greyhound's bid for and in consideration of Respondent Dollar's promise to indemnify against a potential antitrust violation. However, as noted in the Eleventh Circuit's opinion below:

> . . . This interpretation of the agreement cannot be supported by either the language of the

agreement or by any inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound's bid or to any other particular course of action . . . (676 F.2d at 1384).

Indeed, the City Council did not even know of the telegram and letter in question which has been referred to as an "agreement" when it voted to reject Petitioner's bid. The reason that Petitioner's bid was rejected was that Petitioner was not physically capable of providing a consistently high level of service to the travelling public which combines maximum convenience to the public, uniform ability to provide service throughout the United States, and a common basis for competition among the concessions, as required by the "national scale" specification (676 F.2d, 1381, 1382 and 1384).

The Eleventh Circuit specifically states in Footnotes 10 and 11 on page 1384 that they were expressing no opinion as to the enforceability of Dollar's promise or "agreement" to indemnify since that was not a question that was before the Court. Petitioner now improperly seeks to present that question to this Court.

3. In Question 3, Petitioner claims the opinion below conflicts with the Court's opinion in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, ____ U.S. ____, 102 S.Ct. 1935 (1982). Petitioner made the same claim in its petition for rehearing before the Eleventh Circuit. In that case, this Court held a principal could be subjected to antitrust liability for

acts of his agent performed with apparent authority. That holding has no possible application to the instant facts. There is no evidence that the City Attorney promised anything from the City Council in return for an indemnity agreement. Hence, no question of apparent authority is presented by the Record.

4. The result below is right and just. A city's decision to require car rental companies at a regional airport to do business on a national scale makes complete good sense and in this case is amply supported by testimony and documents contained in the Record. Indeed, on the appeal below, Petitioner abandoned any claim to the contrary, as noted in Footnote 8 of the opinion below.

CONCLUSION

The Respondent City respectfully submits that the petition should be denied.

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No. 82-745

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In The

Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

v.

The CITY OF PENSACOLA, and DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT

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OCTOBER TERM 1982

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On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Eleventh Circuit

REPLY OF PETITIONER GREYHOUND IN SUPPORT

Contrary to the Argument of the Respondent City of Pensacola, the holding of the Court of Appeals directly raises as a *matter of law* the Questions Presented as stated in the Petition. Greyhound's appeal to the Eleventh Circuit was based upon erroneous jury instruction

concerning the antitrust laws[1] under which the jury returned a general verdict for the defendents City of Pensacola and Dollar Rent-A-Car System. Unless such defendants were entitled to a directed verdict as a matter of law on the antitrust charge, an erroneous jury instruction would require a reversal and remand for a new trial with proper instructions. The Court of Appeals *expressly* ruled it was unnecessary to consider the errors in the general antitrust instruction, because there was no Section 1 agreement as a matter of law.

> "We affirm the entry of judgment against Greyhound because we conclude there was insufficient evidence to establish any contract, combination, or conspiracy between Dollar and the City within the meaning of § 1 of the Sherman Act. Greyhound having failed to prove the first element of its § 1 claim, we need not therefore address the challenges it presents to the jury instructions and to the admission and exclusion of evidence unrelated to the issue of agreement." (676 F.2d at 1303).

Because the opinion of the Eleventh Circuit holds as a matter of law the indemnity agreement could not be sufficient evidence of a Section 1 Sherman agreement, the effect of that decision is that not even a properly instructed jury could have found for Greyhound.

---

[1]Greyhound asserted the general antitrust instruction given was erroneous upon two alternative grounds: First, that the Court erred in giving a Rule of Reason rather than a per se instruction and second, if a per se instruction was not warranted, that the instruction given by the Court incorrectly defined the law concerning the Rule of Reason.

The Court of Appeals expressly discussed the indemnity agreement which was argued by Petitioner-Greyhound. The Court's holding in rejecting Petitioner Greyhound's contentions raised the stated questions presented. 676 F2d at 1382-1384.

If the City of Pensacola is contending that the indemnity agreement was not raised in the evidentiary record, then this too is contrary to the acknowledged facts. In addition to the record references noted in the Petition and the Eleventh Circuit opinion, the record reflects that the City itself brought out the existence of the indemnity agreement:

> "Q. And without replowing the same old ground, did that telegram authorize or state that Dollar would indemnify the city for any loss growing out of this particular litigation or any litigation involving the awarding of the bid?
>
> A. Yes, sir.
>
> Q. And did that letter, did that telegram and that letter reflect your understanding insofar as your obligation? When I say "your," I mean Dollar's obligation.
>
> A. Yes, sir.
>
> * * *
>
> Q. And have you ever denied that you sent the telegram and that the purpose of the telegram was to make clear that Dollar would indemnify the city?
>
> A. No.
>
> R. Vol. X, p. 82. [Questions by City; Answers by Dollar's Paxton.]

The Respondent City seeks to avoid discussion of the issues by pretending they do not exist. Although such diversionary tactic may not be unusual, it does little to aid in determining whether or not this Court should hear the case. Because the Questions Presented do involve matters that are of substantial public importance and are inconsistent with holdings this Court and other Courts of Appeals, the Writ of Certiorari should be Granted.

Respectfully,

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